2003

Barry Sanns v. Butterfield Ford, a Utah corporation and Form Motor Company, a Delaware corporation : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BARRY SANNS, an individual, Plaintiff and Appellant, vs. BUTTERFIELD FORD, a Utah corporation, Defendant and Appellee. and FORD MOTOR COMPANY, a Delaware corporation, Defendant.	**BRIEF OF APPELLEE BUTTERFIELD FORD** Case No. 20030497-CA

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE STEPHEN L. HENRIOD PRESIDING

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Rule of Civil Procedure 54(b), Utah Rule of Appellate Procedure 3(a) and Utah Code Annotated § 78-2a-3(2)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

This appeal presents two issues for review on appeal before this Court:

1. Whether the trial court properly found that there was no genuine issue of material fact as to whether Butterfield Ford could be liable to the Plaintiff for damages under Plaintiff's claims for negligence, strict products liability or breach of warranty.

2. Whether a distributor of an allegedly defective product can be held strictly liable for harm caused by the product under the Utah Liability Reform Act where the distributor did not participate in the design, manufacture or testing of the product or prepare any labeling or warnings on the product, and where these duties have been expressly assumed by the manufacturer who is a named and participating defendant in the action.

As stated correctly by Appellant, in reviewing a trial court's decision to grant summary judgment, the appellate court "need review only whether the trial court erred in applying the relevant law and whether a material fact was in dispute." WebBank v. American Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 10, 54 P.3d 1139. The trial court's legal conclusions are reviewed for correctness and are accorded no deference. See id.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES THAT ARE DETERMINATIVE OF ISSUES ON APPEAL

The following are determinative of the above issues on appeal:

1. Utah Rule of Civil Procedure 56(c);

2. UTAH CODE ANN. §§ 78-27-37(2), -38(3), -39(1) and -40.

STATEMENT OF THE CASE

A. Nature of the Case

This case is a products liability case in which the Plaintiff, Barry Sanns, alleges that injuries he sustained as a passenger in a rollover automobile accident were caused by certain design defects in the vehicle. [R. 1-7.] The vehicle at issue is a 1999 Ford Econoline E-350 Super Club Wagon (the "Van") which was sold by Butterfield Ford to Plaintiff's former employer, the Utah Department of Corrections. [R. 44.] Plaintiff sued both Butterfield Ford and Ford Motor Company under theories of strict products liability, negligence and breach of warranty. [R. 1-7.]

B. Course of Proceedings Below

On or about September 9, 2002, Appellee Butterfield Ford filed a Motion for Summary Judgment (the "Motion"), together with a memorandum in support of the Motion and an Affidavit from Brent E. Butterfield (the "Butterfield Affidavit"). [R. 30-45.] In the Butterfield Affidavit, Butterfield Ford demonstrated that (i) it did not participate in the design, manufacture, engineering, testing or assembly of the Van, (ii) it did not prepare any warnings, labeling or instructions associated with the Van, and (iii) other than a simple pre-delivery inspection of the Van, it never performed any services or repairs on the Van. [R. 44.] Through the Motion, Butterfield Ford sought dismissal of Plaintiff's claims against it, alleging that there are no facts which would support a finding of any liability against it under the Utah Liability Reform Act. [R. 33-41.] Butterfield Ford also sought dismissal of the claims against it on the grounds that it was fraudulently joined in the action for the sole purpose of destroying diversity jurisdiction and preventing Ford Motor Company from removing the case to federal court. [R. 40-41.]

In response to the Motion, Plaintiff alleged, among other things, that he needed additional time to conduct discovery "to test the factual assertions in [the Butterfield Affidavit] and to discover what exactly Butterfield Ford knew about this make and model

of vans, about their propensity to roll over and about this van in particular and to discovery exactly what Butterfield Ford did with respect to the van." [R. 76.] The trial court heard oral argument on the Motion on December 13, 2002. [R. 112.] On January 8, 2003, the trial court granted the Plaintiff 240 days to conduct additional discovery and denied the Motion without prejudice. [R. 121-22.] The court further ordered that at the end of the 240 day discovery period, Butterfield Ford could renew the Motion and if, at that time, Plaintiff failed to controvert the facts established in the Butterfield Affidavit, the Motion would be granted. [Id.]

At the conclusion of the 240 day discovery period and after Plaintiff had taken the deposition of Brent E. Butterfield, Butterfield Ford filed a Renewed Motion for Summary Judgment (the "Renewed Motion"), together with a memorandum in support thereof. The basis of the Renewed Motion was that Plaintiff had failed to discover any facts which would controvert the Butterfield Affidavit or which would otherwise support a finding of any fault or liability on the part of Butterfield Ford. [R. 171-206.] In response to the Renewed Motion, Plaintiff conceded that Butterfield Ford: (i) did not participate in the design, manufacture, engineering, testing or assembly of the Van; (ii) did not prepare any labeling or instructions associated with the Van; (iii) did not perform any services or repairs on the Van; (iv) did not modify or alter the Van in any way; and that (v) the Van arrived at Butterfield Ford as a finished product from Ford Motor Company and was distributed by Butterfield Ford in the same condition, without repair work, modifications, or alterations. [R. 210, 174-75.]

In his deposition, Brent Butterfield testified repeatedly when asked whether he was aware of the handling and stability characteristics of the Van that he knew that a van has a higher center of gravity and will therefore handle differently than a sports car. [R. 191, 198, 200.] Rather than dispute the facts established by Butterfield Ford in the Butterfield Affidavit and Mr. Butterfield's deposition, Plaintiff argued that Butterfield Ford's knowledge that a van has a higher center of gravity than a sports car created a duty

on the part of Butterfield Ford to warn purchasers of the Van of handling "problems." [R. 210, 215.]

C. Disposition of the Court Below

On June 2, 2003, the trial court granted the Renewed Motion and dismissed Plaintiff's claims against Butterfield Ford, finding that: (i) "Plaintiff failed to present any credible evidence to show that Butterfield Ford was anything but a passive distributor" of the Van; (ii) "Butterfield Ford did not design, manufacture, test, assemble, package or ship the vehicle. It did not modify, alter or change the vehicle in any manner"; (iii) the fact that Butterfield Ford acknowledged that a van has a higher center of gravity than a sports car does not create a genuine issue of material fact that the dealer knew of any design defects in the Van; and (iv) the "Utah Liability Reform Act does not provide a cause of action for strict liability against a purely passive distributor where the fault complained of arises out of a design or manufacturing defect, and where the manufacturer/designer of the product is a named party in the action." [R. 327-28.]

Plaintiff's claims against Ford Motor Company, the designer and manufacturer of the Van, are still pending. Those claims have been removed to the United States District Court for the District of Utah, Case No. 2:03-CV-00512,[1] where Plaintiff has filed a motion to remand the claims back to the Third District Court for Salt Lake County, Utah due to this pending appeal. [R. 321-25.]

STATEMENT OF FACTS

On or about December 7, 2000, Plaintiff was a passenger with ten other occupants in a 1999 Ford Econoline E-350 Super Club Wagon passenger van (the "Van") which was designed and manufactured by the Defendant Ford Motor Company. [R. 3.] Plaintiff alleges that near American Fork, Utah, the Van went out of control and rolled

[1] Ford Motor Company intends to have the case consolidated with two other cases that are also pending before the United States District Court for the District of Utah involving the same accident that were filed by other passengers in the Van.

over multiple times, thereby causing him serious injuries. [R. 3.] The Van was sold by Appellee Butterfield Ford in a fleet sale to the Utah Department of Corrections. [R. 44.]

Plaintiff brought causes of action for strict products liability, breach of warranty, and negligence against Defendants Ford Motor Company and Butterfield Ford. [R. 1-7.] Plaintiff alleges that the Van was defective and unreasonably dangerous, in that: (a) the van has stability problems when loaded with more than ten passengers; (b) the van is susceptible to rollovers when loaded with more than ten passengers; (c) driver control difficulties exist when the van is loaded with more than ten passengers; (d) the van has suspension problems when loaded with more than ten passengers; (e) the van has rollover resistance problems when loaded with more than ten passengers; (f) handling difficulties exist when the van is loaded with more than ten passengers; (g) the van lacks proper passenger compartment protection; and (h) the van lacks adequate warnings related to the above alleged defects. [R. 4-5.] Plaintiff also alleges that "Ford Motor Company and/or Butterfield Ford" negligently disseminated information or negligently failed to disseminate information regarding the van's alleged defects. [R. 6.]

Butterfield Ford did not participate in the design, manufacture, engineering, testing or assembly of the Van. [R. 44.] Butterfield Ford did not prepare any labeling or instructions associated with the Van. [R. 44.] Other than a simple inspection of the vehicle known as a Pre-Delivery Inspection, Butterfield Ford never performed any services or repairs on the Van. [R. 44.] Butterfield Ford never modified or altered the Van in any way, and never performed any type of services, repairs, modifications, or alterations to the suspension system, occupant compartment system, or other component parts of the Van that Plaintiff alleges in his Complaint were negligently designed and/or manufactured. [R. 44-45.]

Butterfield Ford had no knowledge regarding any product defects alleged in this case and in fact denies that such defects even exist. Specifically, Mr. Butterfield testified that: (i) from the time Butterfield Ford began selling the Econoline product line, it was

never provided any information regarding the stability characteristics of the product [R. 190-91][2]; (ii) Butterfield Ford was never provided with any information regarding rollover incidents relating to the Econoline product line [R. 200, 202.]; (iii) Butterfield Ford does not receive information regarding the crash worthiness of the vehicles it sells [R. 199.]; and (iv) Ford Motor Company personnel have never visited Butterfield Ford to discuss safety concerns regarding any vehicles sold by Butterfield Ford [R. 203.] The only caution the dealership has been instructed to give to customers, retail or fleet, is that the E-350 Econoline van may not be sold for use as a school bus. The reason for this prohibition is that the vehicle is not equipped with the NHTSA required arm on the side of the vehicle which signals right and left turn, is not painted chromatic yellow and does not have reflective tape and front and rear flashers which are required on school buses. The prohibition has nothing to do with the alleged defects in this case. [R. 193-96.] When Butterfield Ford receives a vehicle from Ford Motor Company, it also receives a delivery checklist which contains information about the vehicle. Nothing in the delivery checklist for the Van in question contained anything about the handling or stability characteristics of the vehicle. [R. 201.]

SUMMARY OF ARGUMENT

The trial court correctly found that Plaintiff failed to bring forward any facts which could create a legal duty or support a finding of fault on the part of Butterfield Ford under the Act.[3] Butterfield Ford properly established, through affidavit and deposition testimony, that it was nothing more than a passive distributor of a product that

[2] Mr. Butterfield testified that the only information he received about the steering characteristics was provided within the owner's manual of the vehicle and on the visor which essentially caution the owner that the van is a van, not a sports car. [R. 191.]

[3] Plaintiff failed to raise any facts or legal argument in his brief challenging the dismissal of his claim for breach of warranties against Butterfield Ford. As such, he has waived any claim of error in the trial court's dismissal of that claim. See American Towers Owners Ass'n. v. CCI Mechanical, Inc., 930 P.2d 1182, 1185 n.5 (Utah 1996) ("Issues not briefed by an appellant are deemed waived and abandoned.")

was designed, manufactured, tested and assembled by Ford Motor Company. Butterfield Ford did not take any part in the design, manufacture, engineering, testing or assembly of the Van. Nor did Butterfield Ford prepare any labeling or instructions associated with the Van, perform any services or repairs on the Van or modify the Van or its component parts in any way. Plaintiff, being unable to refute the above facts, grossly misstates or misrepresents the deposition testimony of Mr. Butterfield, as he did in the trial court, in an attempt to create an issue of fact. Plaintiff also cites to several letters, memoranda and other papers that were not even in existence at the time Butterfield Ford sold the Van to the State of Utah. These materials obviously have no relevance to the time period when Butterfield Ford sold the Van to the State of Utah. In short, the trial court properly found the "facts" raised by Plaintiff to be both immaterial and not credible to show that Butterfield Ford was anything more than a passive distributor of the Van.

Having found that the Plaintiff failed to bring forward any facts to demonstrate that Butterfield Ford was more than just a passive distributor of the Van, the trial court properly held that the "Utah Liability Reform Act does not provide a cause of action for strict liability against a purely passive distributor where the fault complained of arises out of a design or manufacturing defect, and where the manufacturer/designer of the product is a named party to the action." The Act was enacted as part of a nationwide tort reform movement for the purpose of abrogating the unfair, wasteful common law strict products liability actions which allowed a nonmanufacturing passive distributor such as Butterfield Ford to be held 100% liable for a plaintiff's damages under the doctrine of joint and several liability. Traditionally, a nonmanufacturing distributor with zero liability could be held 100% liable for a plaintiff's injuries simply for being in the "chain of distribution" of the product. The distributor then had to attempt to recoup its damages from the manufacturer of the product through a separate indemnification or contribution action. Therefore, although a purely passive distributor was often reimbursed for any damages it was forced to pay in a strict products liability action from the manufacturer, it

was forced to expend a significant amount of time and resources in doing so.

In order to do away with the inherent unfairness of forcing a party with no liability to participate and expend time and resources defending itself in a lawsuit and then pursuing another action for indemnification, Utah and numerous other states enacted tort reform legislation to address the problems. The Utah Act allows plaintiffs to recover from defendants only to the extent of their proportionate share of fault. In other words, if a defendant did not engage in any conduct from which a fact finder could apportion any fault, that defendant is not liable for any of the plaintiff's damages. Legislatures in Utah and the majority of other states recognized the wastefulness and injustice involved in allowing a plaintiff to sue and recover from a defendant with no fault. Indeed, both the Utah Supreme Court and this Court have explicitly recognized that the Act supersedes the unfair common law actions described above by abolishing joint and several liability and common law actions for indemnification or contribution. In so doing, the Act also necessarily abolished claims against purely passive distributors based on strict products liability for design defects where the manufacturer of the allegedly defective product is a named, participating defendant in the action.

Because Butterfield Ford was nothing more than a passive distributor of the Van and did not engage in any conduct which would support a finding of fault under the Act, the trial court properly dismissed Plaintiff's claims against Butterfield Ford as a matter of law where Ford Motor Company is a named, participating defendant in the action. To force Butterfield Ford to continue to expend time and resources defending itself in the action would contravene the very purpose of the Act and contradict the express language of the Act that prevents recovery from a defendant without any fault.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF BUTTERFIELD FORD BECAUSE PLAINTIFF FAILED TO BRING FORWARD ANY FACTS SUPPORTING HIS CLAIMS AGAINST BUTTERFIELD FORD.

Even after receiving an additional 240 days to conduct discovery, Plaintiff was unable to bring forward any evidence that could create a legal duty or support a finding of fault on the part of Butterfield Ford. It is well established in Utah that "when a party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case ... there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Burns v. Cannondale Bicycle Co., 876 P.2d 415, 420 (Utah Ct. App. 1994) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (quoting FED. R. CIV. P. 56(c)); accord, Schafir v. Harrigan, 879 P.2d 1384, 1391 (Utah Ct. App. 1994). In this case, the Plaintiff failed to bring forward any facts which could establish a legal duty or support a finding of fault on the part of Butterfield Ford under the Act.

In the Butterfield Affidavit, Butterfield Ford established that (i) it did not participate in the design, manufacture, engineering, testing or assembly of the Van, (ii) it did not prepare any warnings, labeling or instructions associated with the Van, and (iii) other than a simple pre-delivery inspection of the Van, it never performed any services or repairs on the Van. At Plaintiff's request, the trial court granted Plaintiff 240 days to conduct discovery to controvert the facts established in the Butterfield Affidavit. During that period, Plaintiff conducted a single deposition – that of Brent Butterfield. Mr. Butterfield simply confirmed in his deposition what he testified to in his affidavit. Therefore, Butterfield Ford filed a renewed motion for summary judgment (the "Renewed Motion").

In response to the Renewed Motion, Plaintiff conceded that Butterfield Ford: (i) did not participate in the design, manufacture, engineering, testing or assembly of the Van; (ii) did not prepare any labeling or instructions associated with the Van; (iii) did not perform any services or repairs on the Van; (iv) did not modify or alter the Van in any way; and that (v) the Van arrived at Butterfield Ford as a finished product from Ford Motor Company and was distributed by Butterfield Ford in the same condition, without repair work, modifications, or alterations. [R. 210, 174-75.]

Rather than explain the facts discovered that support Plaintiff's theories, Plaintiff drastically exaggerated and drew completely improper inferences from the facts and represented them as "facts." For example, Plaintiff argued that Butterfield Ford was aware of handling and stability "problems" with the Van because Mr. Butterfield testified that the Van has a higher center of gravity than a sports car. It is basic hornbook law that in order to maintain a cause of action for negligence, a plaintiff must establish "a duty of reasonable care owed to the plaintiff." Slisze v. Stanley-Bostitch, 979 P.2d 317, 320 (Utah 1999). "[T]he question of whether a duty exists is a question of law." Id. (citation omitted). In a feeble attempt to establish a legal duty, Plaintiff argues that because Butterfield Ford was aware of the obvious fact that the Van has a higher center of gravity than a sports car, this knowledge somehow transformed Butterfield Ford from a passive distributor to an active distributor with a duty to warn purchasers of that obvious fact.

Plaintiff has failed to cite the Court to a single legal authority which would support his position that Butterfield Ford had a duty to warn purchasers that the Van is defective because it has a higher center of gravity than a sports car. This is because there is no support in the law for such a claim. To the extent that this fact would create a legal duty, because the sale of the Van was part of a fleet sale to the State of Utah, a sophisticated purchaser, the duty was assumed by the State to warn the actual drivers of the vehicle. The trial court properly concluded that "[t]he fact that Butterfield Ford acknowledged a van has a higher center of gravity than a sports car and, as such, handles differently, does

not create a genuine issue of material fact that the dealer knew or should have known of any alleged design defects. It simply means that vans ride higher on the road than sports cars." [R. 327.] This Court should affirm that finding.

The other "facts" relied on by Plaintiff to support his argument that Butterfield Ford had a duty to warn purchasers of "safety problems" with the Van consist of certain letters, articles and other materials which were not even published until 2001, 2002 and 2003. [R. 247-77.] Plaintiff implies that these materials – published in 2001, 2002 and 2003 – somehow created a duty on the part of Butterfield Ford to inform purchasers of the contents of the materials when the Van was sold in 1999! Obviously, such an argument lacks merit. There cannot be a legal duty imposed on a party to inform third parties of information that was not even in existence or available at the time the alleged duty arose.

Although the law requires a trial court deciding a motion for summary judgment to view the facts in the light most favorable to the nonmoving party, "[i]t does not require unreasonable factual inferences, nor does it require that the court turn a blind eye to reasonable inferences based on uncontested facts." Surety Underwriters v. E & C Trucking, Inc., 2000 UT 71, ¶ 37, 10 P.3d 338. In this case, the trial court properly viewed all facts and reasonable inferences to be drawn therefrom in a light most favorable to Plaintiff and found there to be no genuine issue of material fact that would preclude entry of summary judgment in favor of Butterfield Ford as a matter of law.

II. BECAUSE PLAINTIFF FAILED TO PRESENT ANY FACTS TO SUPPORT A FINDING OF FAULT UNDER THE LIABILITY REFORM ACT, THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS AGAINST BUTTERFIELD FORD.

There being no genuine issue of fact, the issue before this Court is whether the trial court properly applied the undisputed facts to the law. The Utah Supreme Court has recently held that "[t]he application of the [Liability Reform Act] in apportioning fault is

a legal question of statutory construction." Bishop v. Gentec, Inc., 2002 UT 36, ¶ 8, 43 P.3d 218. Because the material facts are not in dispute, the issue before the Court is purely a question of the legal construction of the Act and was appropriately determined on summary judgment.

The Act provides that "[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant ...." UTAH CODE ANN. § 78-27-38(3). "Fault" is defined under the Act as "any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence ..., comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product." Id. § 78-27-37(2). Therefore, unless a plaintiff is able to demonstrate some breach of legal duty, act, or omission by a defendant that proximately caused or contributed to the injury or damages complained of, there can be no recovery from that defendant under the Act.

Plaintiff argues that because the definition of "fault" includes "strict liability" and "products liability," then any defendant in a strict products liability action is at "fault" under the Act. Indeed, Plaintiff alleges that simply because he has asserted claims against Butterfield Ford sounding in strict products liability and such claims are encompassed within the Act's definition of "fault," Butterfield Ford is at fault under the Act. [Brief of Appellant at 13.] However, the inclusion of the phrases "strict liability," "products liability" and others in the definition of fault simply illustrates the Act's requirement that fault be apportioned in those circumstances, not that fault means "negligence ..., comparative negligence, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product." Rather, the definition of fault under the Act clearly requires some "breach of legal duty, act, or omission proximately causing or contributing to injury or damages."

As demonstrated below, Plaintiff's strained interpretation of the Act contravenes the express language and purpose of the Act and renders the Act meaningless. Plaintiff's interpretation also contradicts the Utah appellate court decisions interpreting and applying the Act. The only legal authorities Plaintiff is able to muster in support of his position are based on doctrines and theories that have been expressly abolished in Utah.

A. Traditional products liability actions – joint and several liability and actions for contribution or indemnification.

As correctly pointed out by the Plaintiff, prior to the adoption of the Act in 1986, Utah courts had adopted and applied the doctrine set forth in the Second Restatement of Torts, Section 402A, which provides that a party who sells a product in a defective, unreasonably dangerous condition to the user or consumer is subject to liability for physical harm thereby caused to the ultimate user or consumer if (i) the seller is engaged in the business of selling the product, and (ii) the product is expected to and does reach the user or consumer without substantial change. See Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979).[4] Under Utah law prior to passage of the Act, multiple tortfeasors were jointly and severally liable for all damages caused by a defective product. See e.g., Cruz v. Montoya, 660 P.2d 723, 728 (Utah 1983). As such, "a tortfeasor was potentially liable for the entire amount of a plaintiff's damages, irrespective of what proportion of fault was actually attributable to that individual tortfeasor as opposed to another joint tortfeasor." National Svc. Indus., Inc. v. B.W. Norton Mfg. Co., Inc., 937 P.2d 551, 554 (Utah Ct. App. 1997) (citing Brunyer v. Salt Lake County, 551 P.2d 521, 523-24 (Utah 1976) (Ellet, J., dissenting); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 336-38 (1984)).

In an effort to ameliorate the harshness of the common law rule of joint and several liability, Utah adopted the Utah Comparative Negligence Act in 1973. See UTAH

[4] What Plaintiff failed to address in his brief is the effect of the Act on this doctrine. That subject is discussed at length below. See infra, Section II.D.2.

CODE ANN. §§ 78-27-37 through 78-27-43 (1973), repealed by Liability Reform Act of 1986; see also Brad C. Betebenner, *The Liability Reform Act: An Approach to Equitable Application*, 13 J. Contemp. L. 89, 91-92 (1987). The Comparative Negligence Act created a new cause of action for contribution, which allowed a tortfeasor forced to pay damages greater than its proportion of fault to recover from other joint tortfeasors in a separate action. See UTAH CODE ANN. § 78-27-39 (1973), repealed by Liability Reform Act of 1986. At common law, a defendant held jointly and severally liable for a plaintiff's damages who had no fault could also pursue a separate action for indemnification against other tortfeasors. See National Svc. Indus., Inc., 937 P.2d at 554 (citations omitted). Traditionally, an action for indemnification involved full reimbursement whereas an action for contribution involved splitting damages among joint tortfeasors. See id. (citing RESTATEMENT 2D TORTS § 886B, cmt. a (1977)). The common purpose behind contribution and indemnity principles is that they attempted to "ensure that parties are not held unfairly liable to an extent greater than their degree of fault. Because tortfeasors were jointly and severally liable, joint tortfeasors could achieve fair distribution of loss, in many cases, only through separate suits among themselves...." Id.

The rationale behind joint and several liability was that, as between an innocent plaintiff and a jointly liable tortfeasor, either the jointly liable tortfeasor should be responsible for joining other fellow tortfeasors, or alternatively, the jointly liable tortfeasor should seek contribution or indemnity in a separate action. See Betebenner, supra, at 94-95. However, as discussed more fully below, applying the doctrine of joint and several liability in products liability actions based on strict liability caused plaintiffs to abuse the system and were inherently unfair, causing the majority of states in the country to significantly modify their approach to tort litigation.[5]

[5] In fact, Utah has completely abolished the doctrine of joint and several liability and eliminated separate actions for contribution or indemnification. See infra Section II.D.1.

B. The nationwide tort reform movement and enactment of tort reform legislation.

In the mid-1980s, state legislatures across the country, including Utah, recognized the inherent unfairness of joint and several liability and the massive costs incurred by defendants who had little or no fault which contributed to plaintiffs' damages. See Betebenner, supra, at 93 (discussing public concern that defendants with little or no fault were being held liable for damages and skyrocketing insurance costs and jury awards); Joseph Sanders and Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUSTON L. REV. 207, 210-11 (1990) (explaining joint and several liability caused drastic increases in cost of insurance as a result of companies with little or no fault being held jointly and severally liable for large damages awards.) The unfairness and escalating insurance and other costs associated with the doctrine of joint and several liability caused legislatures throughout the country, including Utah, to enact tort reform legislation to address these problems.

Between 1985 and 1988, forty-eight states adopted varying forms of tort reform legislation to mitigate the unfairness of joint and several liability and the skyrocketing costs and jury awards against parties with little or no fault. See Sanders et al., supra, at 210 n.13, 220-22. The common thread among the varying tort reform statutes is their purpose to limit or completely abolish the harsh effects of joint and several liability. See Mike Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 Tort & Ins. L.J. 482, 483 (1998) ("The justifications that have been advanced for the reformation of joint and several liability have been based in part on the insurance crisis and in part on what is perceived to be the inherent unfairness of the rule of joint and several liability.") Thirty of the forty-eight states enacting tort reform legislation either limited or completely abolished joint and several liability. See Sanders et al., supra, at 220-22.

Numerous legislatures around the country recognized the inequitable, callous effects of joint and several liability in actions holding passive distributors of products strictly liable for harm caused by those products when the distributors had no involvement in the design or manufacture of the products. In fact, many states enacted legislation expressly prohibiting products liability actions based on the doctrine of strict liability against a seller of a product unless the seller is also the manufacturer, or participated in the manufacture, of the product. See e.g., GA. CODE ANN. § 51-1-11.1; IND. CODE ANN. § 34-20-2-3; NEB. REV. ST. § 25-21,181; S.D. CODIFIED LAWS ANN. § 20-9-9. Several other states have expressly barred products liability actions based on strict liability against nonmanufacturing sellers of products unless the manufacturer of the product is insolvent or not subject to the jurisdiction of the respective court. See e.g., DEL. CODE ANN. tit. 18, § 7001; IDAHO CODE § [6-1407] 6-1307; 735 ILL. COMP STAT. ANN. 5/2-621; IOWA CODE § 613.18; KAN. STAT. ANN. § 60-3306; KY. REV. STAT. ANN. § 411.340; MD. CTS. & JUD. PROC. § 5-405; MINN. STAT. ANN. § 544.41; MO. ANN. STAT. § 537.762; N.C. GEN. STAT. ANN. § 99B-2; N.D. CENT. CODE § 28-01.3-04; OHIO REV. CODE ANN. § 2307.78; TENN. CODE ANN. § 29-28-106; WASH. REV. CODE ANN. § 7.72.040. The rationale and basis for immunizing nonmanufacturing sellers from liability in strict products liability actions is that

> "... bringing nonmanufacturing sellers or distributors into products liability litigation generates wasteful legal costs. Although liability in most cases is ultimately passed on to the manufacturer who is responsible for creating the product defect, nonmanufacturing sellers or distributors must devote resources to protect their interests. [I]mmunizing nonmanufacturers from strict liability saves those resources without jeopardizing the plaintiff's interests."

RESTATEMENT 3RD TORTS: PRODUCTS LIABILITY § 1, cmt. e (1998).

Therefore, it is clear that, in addition to the general inherent unfairness of joint and several liability, legislatures across the country were concerned specifically with the problem of holding nonmanufacturing, passive distributors such as Butterfield Ford strictly liable for product defects. As demonstrated below, Utah, like the other states

adopting comparative fault legislation, chose to address this problem indirectly by prohibiting recovery from any defendant in excess of that defendant's proportionate share of fault.

C. Enactment of the Utah Liability Reform Act.

As part of the nationwide tort reform movement in the mid-1980s, Utah adopted the Utah Liability Reform Act in 1986, UTAH CODE ANN. §§ 78-27-37 through 78-27-43. The Act provides that "[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39." UTAH CODE ANN. § 78-27-38(3). Section 78-27-39 requires that the trial court direct the jury to find separate special verdicts determining the total amount of damages and the percentage or proportion of fault attributable to each plaintiff, each defendant and any other person who contributed to the alleged injury, including persons immune from suit. See id. § 78-27-39(1). Section 78-27-40 again provides that the "maximum amount for which any defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant." Id. § 78-27-40(1). As noted above, "fault" is defined under the Act as "any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence ..., comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product." Id. § 78-27-37(2).

The purpose of the Act, as stated by the legislature, was to ensure that no defendant pay any more than its "fair share" of damages. Minutes, Utah Senate, State and Local Standing Committee, 46th Leg., 1986 General Sess. (Jan. 27, 1986); Floor Debate, Utah House of Representatives, 46th Leg., 1986 General Sess., Records 17 & 18 (Feb. 26, 1986). As one senator observed, "it is the basic fairness concept we're driving

at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages." Floor Debate, Utah Senate, 46th Leg. 1986, General Sess., Records No. 63 (Feb. 12, 1986) (emphasis added). It is clear from the legislative history of the Act that it was aimed at preventing the same harsh and unfair effects of joint and several liability discussed above that other tort reform legislation was aimed to mitigate. In fact, each preliminary draft of the Act stated in the title that the purpose of the Act was, among other things, "abolishing joint and several liability."

D. The Act abolished joint and several tort liability and separate actions for contribution and indemnification and precludes recovery from any party without any fault.

Plaintiff argued before the trial court, and continues to argue in his brief before this Court, that the traditional principles in strict products liability litigation discussed above, supra Section II.A. (i.e., joint and several liability, strict liability of distributors of defective products, and contribution or indemnification), are still viable in Utah notwithstanding the State's adoption of the Act. [Brief of Appellant at 14-20.] Plaintiff's continued reliance on case law decided well before enactment of the Act is astonishing and does nothing to aid this Court in applying the Act to the undisputed facts of this case. Plaintiff fails to connect the dots and explain the current status of the law in Utah after adoption of the Act.

1. Effect of the Act on the doctrine of joint and several liability and separate actions for contribution and indemnification.

In support of his position that a purely passive distributor of a defective product may be held liable under the Act under the doctrine of strict liability, Plaintiff states that "other authorities that have considered the issue have concluded that the liability of a passive retailer in a case like this is a form of vicarious liability and that the retailer and

manufacturer should therefore be treated as a single unit for apportionment of fault; to the extent the retailer is held liable for the harm caused by the defective product, it may have a claim for indemnity against the manufacturer." [Brief of Appellant at 18 (emphasis added) (citations omitted).] The only Utah case relied on by Plaintiff for this proposition is Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443, 447 (Utah Ct. App. 1998) which Plaintiff concedes was "decided under the law as it existed before passage of the Liability Reform Act." [Id. at 19.] Plaintiff also argues that "[s]trict products liability is a joint tort in the original sense of the word" and that joint tortfeasors "could all be liable for all of the plaintiff's injuries, under the theory that the act of one was the act of all." [Id.] Plaintiff's arguments and his continued reliance on the authorities cited demonstrates Plaintiff's misunderstanding of the Act and its effect on traditional common law products liability doctrines.

Plaintiff's statement that a manufacturer and a retailer "should be treated as a single unit for apportionment of fault" and his reliance on the doctrine of joint and several liability flies in the face of the express language of the Act and Utah appellate decisions interpreting the Act. Plaintiff essentially argues that a seller and a manufacturer of a product are jointly and severally liable for damages caused by defects in the product. This is the very evil that the Act was intended to avoid! Indeed, both this Court and the Utah Supreme Court have held that the Act "abolished joint and several liability by providing that '[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant.'" National Svc. Indus., Inc., 937 P.2d at 554-55 (quoting Utah Code Ann. § 78-27-38 (1996)); see also Sullivan v. Scoular Grain Co. of Utah, 853 P.2d 877, 882 (Utah 1993). Therefore, to the extent Plaintiff's claims against Butterfield Ford are based on the doctrine of joint and several liability, they fail as a matter of law.

As a further justification for holding a purely passive distributor strictly liable under the Act, Plaintiff argues that a nonmanufacturing seller that is held liable for

product defects can simply file an action for indemnity against the manufacturer. This argument is also contrary to the express language of the Act and established Utah law applying the Act. The Act expressly states that "[a] defendant is not entitled to contribution from any other person." UTAH CODE ANN. § 78-27-40(2). As this Court has recognized, this provision makes sense because "with the abrogation of joint and several liability, there remains no need for suits to redistribute loss among joint tortfeasors because no party will in any case be liable for more than its degree of fault in the underlying tort action." National Svc. Indus., Inc., 937 P.2d at 555. The Court went on to hold that the Act necessarily "prohibit[s] any action separate from the underlying tort action which seeks to redistribute loss based on degree of fault," including actions for indemnification, and barred the plaintiff's indemnification claim. Id. at 555-56. Therefore, Plaintiff's reliance on the doctrines of contribution and/or indemnification in support of his claims also fails.

2. Effect of the Act on Restatement Second of Torts § 402A.

Plaintiff also continues to rely on the doctrine set forth in the Second Restatement of Torts, Section 402A which provides that a nonmanufacturing seller of a defective product may be held strictly liable for harm caused by the product. However, Plaintiff again fails to explain what effect the Act has had on that doctrine in Utah and continues to rely on case law applying the doctrine decided well before adoption of the Act. A careful review of the Act and its purposes demonstrates clearly that the traditional common law strict products liability of passive distributors of defective products set forth in Section 402A of the Second Restatement is no longer good law in Utah. Instead, Utah law now requires apportionment of fault among all parties and expressly prohibits liability in excess of the parties' proportionate share of fault. As correctly stated by Plaintiff in his brief, the rationale behind Section 402A is that "as between an innocent user of the product and the person who sold the product, the one who should bear the loss

is the one who created the danger by placing the product on the market ...." [Brief of Appellant at 15 (citing Restatement 2d Torts § 402A, cmt. c and f; Ernest W. Hahn, Inc., 601 P.2d at 156-57; Hanover v. Cessna Aircraft Co., 758 P.2d 443, 445 (Utah Ct. App. 1988)).] This is the same policy underlying the doctrine of joint and several liability, which has been abolished by the Act. The Utah Legislature and other legislatures across the country made a conscious and intentional decision to shift the burdens involved in products liability litigation by requiring plaintiffs to locate and join all potentially liable tortfeasors at the initiation of the action and to prevent defendants from being liable for any more than their "fair share" of the plaintiff's damages.

The new Restatement acknowledges the questionable application of Section 402A in jurisdictions that have enacted tort reform legislation abolishing joint and several liability, stating that such legislation "to some extent, immunizes nonmanufacturing sellers or distributors from strict liability." RESTATEMENT 3RD TORTS: PRODUCTS LIABILITY § 1, cmt. e (1998). Other commentators have also recognized the questionable application of Section 402A in jurisdictions that have enacted comparative fault legislation. See e.g., 6 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 18:124 at 79 (1989) (acknowledging that there is "some question as to the product liability of nonmanufacturing sellers ... in light of limiting legislation.") In light of (i) the express language of the act prohibiting a defendant from being held liable for any damages in excess of its proportionate share of fault, (ii) the purpose of the Act to eliminate the very unfairness created by Section 402A, and (iii) the abolishment of joint and several liability and separate actions for contribution or indemnification, the principles set forth in Section 402A cannot be reconciled with the Act.

E. Under the Act, there can be no liability against a purely passive distributor absent a showing of fault which caused or contributed to the plaintiff's injuries.

As demonstrated above and before the trial court, the material facts are not disputed. Butterfield Ford did not (i) participate in the design, manufacture, engineering, testing or assembly of the Van; (ii) prepare any labeling or instructions associated with the Van; (iii) perform any services or repairs on the Van; or (iv) modify or alter the Van in any way. Moreover, the Van arrived at Butterfield Ford as a finished product from Ford Motor Company and was distributed by Butterfield Ford in the same condition, without repair work, modifications, or alterations. The only issue before the trial court and this Court is one of law. That issue is, given the above undisputed facts, whether Butterfield Ford engaged in any conduct which would support a finding of fault on the part of Butterfield Ford under the Act. For the same reasons that many jurisdictions have expressly prohibited products liability actions based on strict liability against nonmanufacturing defendants through legislation, and the reasons that allowed passive, nonmanufacturing distributors to obtain full indemnity from manufacturers under traditional common law principles, there can be no liability on the part of Butterfield Ford under the Act.

Those courts that have addressed the issue in states that have abolished or limited joint and several liability have held that a purely passive distributor of an allegedly defective product cannot be liable for harm caused by the product absent a showing that the seller somehow participated in the manufacture of the product. See e.g., In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 204 F. Supp. 2d 1149, 1152 (S.D. Ind. 2002); Matthews v. Wal-Mart Stores, Inc., 708 So.2d 1248, 1249 (La. Ct. App. 1998); Schneider v. Tri Star International, Inc., 476 S.E.2d 846, 848 (Ga. Ct. App. 1996); Alltrade, Inc. v. McDonald, 445 S.E.2d 856, 858 (Ga. Ct. App. 1994); Mask v. Chrysler Corp., 825 F. Supp. 285, 288-89 (N.D. Ala. 1993); Zehner v. Nordskog Indus.,

Inc., 1992 U.S. Dist. Lexis 13382, 8-12 (E.D. La. 1992); Liesener v. Weslo, Inc., 775 F. Supp. 857, 859 (D. Md. 1991); Funk v. Wagner Machinery, Inc., 710 S.W.2d 860, 862 (Ky. Ct. App. 1986). Unlike the cases cited by Plaintiff which are premised on the traditional products liability theories which have now been expressly abolished in Utah, the above cases are premised on the purposes of the tort reform legislation discussed above – namely, to eliminate the harsh, inequitable results of joint and several liability and the wasteful legal costs of forcing a party with no fault to nevertheless compensate the plaintiff for damages. To hold otherwise would thwart the very purposes of the Act and be contrary to the express language of the Act and the established Utah law interpreting the Act.

The Utah cases cited by Plaintiff in his brief which were decided after passage of the Act are, unfortunately, not helpful in deciding the issue before the Court. The simple fact is that the issue presented is one of first impression that has not been decided by a Utah appellate court. For example, Plaintiff cites this Court's opinion in House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct. App. 1994) for the proposition that "Utah appellate courts have continued to recognize that non-manufacturing sellers of products are potentially liable for claims sounding in products liability, even after enactment of the Liability Reform Act." [Brief of Appellant at 16.] However, a closer look at the House decision reveals that it does not deal with a "non-manufacturing seller of a product" as Plaintiff alleges. Rather, in House, the trial court granted summary judgment in favor of defendants that were in the business of "designing, manufacturing, testing and selling bullet-resistant vests." Id. at 545. This Court reversed the summary judgment entered in favor of the defendants on the grounds that there were issues of fact regarding whether the defendants had a duty to warn the plaintiff and whether defendants had satisfied that duty through the warning they placed on the subject vest. See id. at 549-51.

The defendants in House were not passive at all and their participation in the manufacture, design and labeling of the product in question precluded the entry of summary judgment in their favor. In contrast, there is no dispute that Butterfield Ford played no part in the design, manufacture, testing, engineering or labeling of the Van in question. As the trial court found, Plaintiff failed to bring forward any facts to show that Butterfield Ford was anything more than a passive distributor of the Van.

The dictum quoted by Plaintiff in Jackson v. Phillip Morris Inc., 46 F. Supp. 2d 1217, 1229 (D. Utah 1998) is likewise not helpful in supporting Plaintiff's position. In fact, Jackson directly supports Butterfield Ford's position that Plaintiff's claims are unsupported in law and were brought for the sole purpose of destroying diversity jurisdiction and preventing Ford Motor Company from removing the case to federal court. The court in Jackson held that the plaintiffs "failed to show any sufficient basis for bringing a strict products liability claim against" in-state distributors of cigarettes. Id. at 1228. The court further denied the plaintiffs' motion to remand the case back to state court after removal and held that the in-state distributors had been fraudulently joined. See id. at 1230.

The Hanover case, although decided by this Court in 1988 applying the law in effect prior to enactment of the Act, does provide some guidance on the issue presented in this Case. In Hanover, a retail seller of an allegedly defective product brought an indemnification claim for attorneys fees, costs and expenses against the manufacturer of the product which were incurred in defending a product liability action. See 758 P.2d at 443. The trial court granted summary judgment in favor of the manufacturer and against the nonmanufacturing seller. See id. at 445. This Court reversed the trial court, holding that a passive seller is entitled to be fully indemnified by the product manufacturer for attorney fees, costs and expenses incurred in defending a product liability action alleging defective product, regardless of whether a judgment was entered against the seller. See id. at 450. This right to indemnification only existed to the extent the non-manufacturing

seller did not engage in any culpable conduct of its own. See id. at 448. In other words, to the extent the passive seller did not engage in any culpable conduct (i.e., was not at "fault"), it was entitled to full indemnification from the manufacturer.

The Hanover case is instructive to this case even though it did not apply the Act because it demonstrates that, even prior to enactment of the Act, passive sellers of defective products were "prevented from being derivatively or vicariously liable for the wrongful act of the manufacturer" under the doctrine of indemnification. Id. at 446. For the same reasons that a passive seller was entitled to complete indemnification from a manufacturer of an allegedly defective product unless the seller engaged in some culpable conduct, a purely passive seller that has not engaged in any culpable conduct may not be held liable for damages under the Act. Prior to enactment of the Act, a passive non-manufacturing seller had to pursue a separate action for indemnification for such a determination. Now, no such action is allowed, nor is it necessary, because a purely passive, nonmanufacturing seller of an allegedly defective product cannot be apportioned any fault for harm caused by the defect under the Act.

As noted above, Plaintiff maintains that because the definition of "fault" under the Act includes the phrases "strict liability" and "products liability," Butterfield Ford may be held strictly liable for defects in the Van. What Plaintiff is essentially arguing is that all defendants along the chain of distribution of a defective product are jointly and severally liable to the Plaintiff for damages. If the Court were to adopt Plaintiff's interpretation of the meaning of "fault," the Act and its purposes would be rendered meaningless. The harsh, unfair results of joint and several liability which the Act was intended to abolish, and in fact did abolish, would continue in Utah despite the legislature's express desire to eradicate them.

Plaintiff's definition of fault begs the question of what constitutes fault and simply returns the status of the law in Utah to the period prior to enactment of the Act as if the Act had no effect on traditional products liability litigation. If fault is equated with "strict

liability" or "products liability," Plaintiff provides no explanation of how fault could be apportioned among several defendants along the chain of distribution. The Act and its purposes clearly contemplate some form of culpable conduct on the part of a defendant. "Fault" means a "breach of legal duty, act, or omission proximately causing or contributing to injury or damages ...." UTAH CODE ANN. § 78-27-37(2). It requires some "breach," "act" or "omission." The Act's prohibition against holding a defendant liable for any amount in excess of the proportion of fault attributed to the defendant would be meaningless if sellers and manufacturers are "treated as a single unit" for apportionment of fault as Plaintiff alleges they should be. In so arguing, Plaintiff implicitly concedes that Butterfield Ford has no fault on its own part but only if considered as a single unit with Ford Motor Company. As noted above, this is called joint and several liability and has been abolished by the Act.

This is not to say that sellers or distributors of products can never be at fault under the Act for damages caused by the products they sell or distribute. If a seller or distributor of a product breaches some duty or engages in some culpable conduct which contributed to the plaintiff's injuries, the seller or distributor could potentially be at fault under the Act. However, where there is no evidence of any breach of legal duty or culpable act or omission on the part of a seller or distributor, the Act does not support a claim against such a defendant.

Utah has long recognized – traditionally through the right to indemnification, and now through principles of comparative fault – that the liability for harm caused by defective products rests squarely on the shoulders of the manufacturers of those products. In this case, Plaintiff's claims against Ford Motor Company, the manufacturer of the Van are still alive and pending. As such, to allow Plaintiff's claims to proceed against Butterfield Ford absent some showing of fault would be wasteful, unfair, and would violate the Act and further the evils that the Act was intended to prevent.

Although the issues presented in this appeal are complex legal issues, the reason

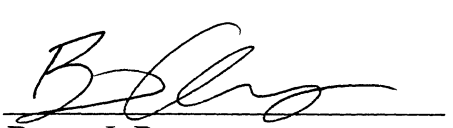
they are before this Court is not because Plaintiff hopes to recover damages from Butterfield Ford. Plaintiff has no such intention. Rather, Plaintiff's sole purpose for filing claims against Butterfield Ford is to destroy diversity jurisdiction and prevent Ford Motor Company from removing the case to federal court. Notwithstanding Plaintiff's desire to have his claims heard in state court, his tactics promote the wasteful legal costs and unfair results which the Act was intended to prevent. Butterfield Ford was entitled to dismissal of the claims against it because Plaintiff failed to bring forward any facts which would support the claims.

CONCLUSION

The trial court properly found that there were no genuine issues of material fact which would preclude entry of judgment as a matter of law. The trial court also properly applied the undisputed facts to the law in dismissing Plaintiff's claims against Butterfield Ford. Plaintiff failed to bring forward any evidence which would create a legal duty which was breached by Butterfield Ford or support a finding of fault against Butterfield Ford under the Utah Liability Reform Act. As such, Butterfield Ford respectfully requests that this Court uphold the purposes and the legal requirements of the Utah Liability Reform Act and affirm the trial court.

DATED this 12th day of November, 2003.

Snell & Wilmer L.L.P.



Bryon J. Benevento
Brian C. Cheney
Attorneys for Appellee Butterfield Ford

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 2003, I caused two true and correct copies of the foregoing to be mailed via first class United States mail, postage pre-paid, to the following:

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ADDENDUM

Utah Rule of Civil Procedure 56. Summary Judgment.

...

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

...

Utah Code Ann. § 78-27-37. Definitions.

As used in Sections 78-27-37 through 78-27-43:

...

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.

Utah Code Ann. § 78-27-38. Comparative negligence.

...

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

...

Utah Code Ann. § 78-27-39. Separate special verdicts on total damages and proportion of fault.

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not and whose identity is known or unknown to the parties to the action, including a person immune from suit who contributed to the alleged injury.

Utah Code Ann. § 78-27-40. Amount of liability limited to proportion of fault --No contribution.

(1) Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

(2) A defendant is not entitled to contribution from any other person.

...

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Attorneys for Defendants Ford Motor Company and Butterfield Ford

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, FOR THE STATE OF UTAH

BARRY SANNS, Plaintiff, v. FORD MOTOR COMPANY, a Delaware Corporation; BUTTERFIELD FORD, a Utah Corporation; and DOES 1 THROUGH 30, Defendants.	**ORDER GRANTING BUTTERFIELD FORD'S RENEWED MOTION FOR SUMMARY JUDGMENT** Civil No. 020904820 Judge Stephen L. Henriod

Defendant Butterfield Ford's Renewed Motion for Summary Judgment ("Renewed Motion") came before this Court for oral argument on May 20, 2003. The Honorable Stephen L. Henriod presided. Plaintiff was represented by David R. Olsen and Paul M. Simmons. Defendant Butterfield Ford was represented by Bryon J. Benevento and Brian C. Cheney. The Court noted that it had previously granted Plaintiff additional time to conduct discovery in order to oppose Defendant Butterfield Ford's initial Motion for Summary Judgment that was filed on December 13, 2002. After reviewing the Renewed Motion, the opposing and supporting memoranda, the

Affidavit of Brent Butterfield, the deposition testimony and other documentary exhibits, and having heard oral argument of counsel, the Court finds as follows:

Findings

1. Plaintiff failed to present any credible evidence to show that Butterfield Ford was anything but a passive distributor of the vehicle in question. Butterfield Ford did not design, manufacture, test, assemble, package or ship the vehicle. It did not modify, alter or change the vehicle in any manner. Instead, it simply sold the vehicle to the State of Utah as part of a fleet transaction in the same condition as the vehicle was received from Ford Motor Company.

2. The fact that Butterfield Ford acknowledged a van has a higher center of gravity than a sports car and, as such, handles differently, does not create a genuine issue of material fact that the dealer knew or should have known of any alleged design defects. It simply means that vans ride higher on the road than sports cars. The Court is not persuaded that this fact changes the status of Butterfield Ford to something other than a passive distributor of the vehicle.

3. The Utah Liability Reform Act ("Act") does not provide a cause of action for strict liability against a purely passive distributor where the fault complained of arises out of a design or manufacturing defect, and where the manufacturer/designer of the product is a named party to the action. Under these circumstances no fault can be apportion to the passive distributor since it was not involved in the design and manufacture of the product. To hold otherwise would render the apportionment of fault a legal fiction since fault presupposes some breach of duty or culpable act of commission or omission that cannot exist in a case of a purely passive distributor. It would also reinstate the concept of joint and several liability which has been expressly abrogated by the Act.

Order

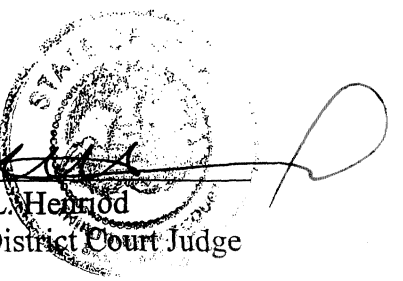
Based upon the forgoing, it is hereby ordered that Defendant Butterfield Ford's Renewed Motion is granted, and Plaintiff's claims against Butterfield Ford are dismissed with prejudice.

The Court expressly determines that there is no just reason for delay and therefore directs that this order be entered as a final judgment as to defendant Butterfield Ford under Utah Rule of

Civil Procedure 54(b).

DATED this 2 day of June, 2003.

By the Court



Judge Stephen L. Henriod
Third Judicial District Court Judge

APPROVED AS TO FORM:

David R. Olsen
Paul M. Simmons
Dewsnup, King & Olsen
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2003, I caused a true and correct copy of the foregoing to be hand-delivered to the following:

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